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Patricia S. Connor
Clerk of Court
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219

Submitted Electronically via CM/ECF

Re: No. 23-1078: *B.P.J. v. West Virginia State Board of Education, et al.*

Dear Ms. Connor:

Plaintiff-Appellant has filed another notice of supplemental authority. ECF No. 170. The decision it addresses, *A.C. by M.C. v. Metropolitan School District of Martinsville*, No. 22-1786, 2023 WL 4881915, at *1 (7th Cir. Aug. 1, 2023), should not affect this Court's decision.

A.C. offers little that is new, as it merely applies an earlier Seventh Circuit decision that B.P.J. already cited. *See* ECF No. 138, at 33, 48 (B.P.J.'s reply citing *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1041 (7th Cir. 2017)); *see also* ECF No. 170-2, at 12 ("*Whitaker* answers almost all the questions raised by these consolidated appeals.").

In any event, *A.C.* does not help here because it considers the distinguishable context of sex-separated bathrooms. Appellees have already explained why "bathroom cases" do not control when evaluating how sports teams are comprised. ECF No. 89, at 66-68. Cases like *Whitaker* and *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), found that the government's interest in preserving privacy was insufficient to justify the sex-distinctions at issue there. *A.C.*,

for instance, concluded that privacy was not truly served by maintaining biological distinctions given how students use stalls and the like in the bathroom and locker rooms. *See* ECF No. 170-2, at 12, 20. In contrast, the law at issue in this case serves the separate interests of fairness and safety. And the district court here held that those interests *were* served by biological-sex-based distinctions. *See* ECF No. 53-8, at 559-61. Quite simply, biological differences have a distinct effect on sports.

No wonder, then, that *A.C.* expressly refuses to address "how Title IX or the Equal Protection Clause regulates … sex-segregated … sports teams." ECF No. 170-2, at 22. Likewise, *A.C.* does not address a line premised on "subjective 'self-identification.'" *Id.* at 23. But those questions are the ones presented here.

Ultimately, Judge Easterbrook's concurrence offers the only insight of assistance here: "Federal law does not compel states" to divorce "sex" from biology, ECF NO. 170-2, at 27, especially as to sports.

Sincerely,

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